

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	
)	
Credit Union National Association)	CG Docket No. 02-278
Petition for Declaratory Ruling)	
)	

November 20, 2017

REPLY COMMENTS ON CUNA PETITION FOR DECLARATORY RULING

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These are the reply comments of the Insights Association,¹ the leading and largest nonprofit association representing the marketing research and analytics industry, to Credit Union National Association (CUNA) petition for declaratory ruling from the Federal Communications Commission (FCC) requesting “that wireless informational calls and texts to credit union member-owners with whom the credit union has an established business relationship, or where the call or text is in fact free, are exempt from the TCPA’s prior express consent requirement.”²

The Insights Association supports the exemptions proposed in the CUNA petition insofar as they would apply to **all** manner of non-telemarketing calls made using a supposed automatic telephone dialing system (autodialer), not just calls from a credit union to its members.

The 2015 Telephone Consumer Protection Act (TCPA) rules from the FCC make it exceptionally challenging and legally hazardous to contact the 65.8% of U.S. households that are only reachable on their cell phones³ to participate in legitimate research studies. The Insights Association is an intervenor in the circuit court case against those rules, but while we await a decision, the proposed exemptions would provide important relief for the marketing research and analytics industry.

Existing business relationship exemption

The existing business relationship (EBR) carveout for calls or texts to wireless devices makes sense, as the CUNA petition and various credit union commenters explain, for non-telemarketing calls and texts from any caller, including those for marketing research purposes.

¹ Launched in 2017, the Insights Association was formed through the merger of two organizations with long, respected histories of servicing the marketing research and analytics industry: CASRO (founded in 1975) and MRA (founded in 1957). Our membership includes both research/analytics companies/organizations, as well as the researchers and research departments inside of non-research companies/organizations. The Insights Association helps empower intelligent business decisions as a voice, resource and network advancing the companies and individuals engaged in this important work. <http://www.insightsassociation.org>

² CUNA petition: <https://ecfsapi.fcc.gov/file/10929652106182/CUNA%20petition%20draft.pdf>

³ More than half of American homes (50.8%) had cell phones and no landline phones in the 2nd half of 2016, and a sixth of American homes (15%, 41 million adults) still had a landline, but received all or almost all calls on their cell phones. (Blumberg SJ, Luke JV. Wireless substitution: Early release of estimates from the National Health Interview Survey, July to December 2016. National Center for Health Statistics. May 2017. Available online:

<https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf>)

EBR exemptions already exist in other parts of the TCPA rules. For instance, in the 1992 TCPA Order,⁴ the FCC granted an EBR exemption for calls to residential telephone lines, which it later clarified in the 2012 TCPA Order⁵ to apply only to non-telemarketing calls to residential lines.

An EBR exemption would be a mild improvement for the marketing research and analytics industry, opening up customer satisfaction research calls, but unfortunately leaving most other kinds of research, especially random digit dial (RDD) surveys, mired in TCPA class action liability.

Exemption for autodialer calls that are free-to-the-called-party

Having been drafted in 1991, the original TCPA statute excluded from the prior express consent requirement for autodialer calls to cell phones those calls that did not result in any charges to the called party. At the time, very few people had wireless devices, and both the phones and the service were very costly. Times, of course, have changed. The cost of a cell phone call in the early nineties was ten times more than today, dropping from approximately 44 cents per minute in 1993 to less than five cents per minute as recently as 2011.⁶

Although the FCC has to date limited this exemption to, as the petition states, “instances where the callers provided assurances that they were capable of ensuring that calls would be free,” the provision⁷ requires no such thing.

With more than half of American telephone users abandoning their residential telephone lines in favor of wireless service, and millions more maintain their home lines but only answer their cell phones, and the CUNA petition notes that “virtually all calls or texts to wireless phones are under unlimited plans and hence free,” so “the distinction between residential and wireless informational calls is no longer fair or sustainable.” Further, nowadays “virtually no one pays for texts or voice calls, either in terms of paying a per-minute or per-text charge, or by having calls or texts count against a bucket of minutes or texts.” A consumer would be hard-pressed to find a cell phone plan now with “incremental charges for minutes of use or texts.” Meanwhile, even low-income households have access to unlimited calling and texting plans if they use the FCC’s Lifeline program that provides subsidized or free telephone and Internet service. “Although some of these plans may still utilize buckets of minutes, at least for their least expensive plans, almost all provide unlimited, free texting.”

⁴ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Report and Order, 7 FCC Rcd. 8752, 8770–71, ¶ 34 (1992).

⁵ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 27 FCC Rcd. 1830, 1845–48, ¶¶ 35–43 (2012).

⁶ Prepared Testimony of Michael Altschul, General Counsel, CTIA – The Wireless Association before the House Subcommittee on Communications & Technology regarding the Mobile Informational Call Act of 2011. Nov. 4, 2011. (citing Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Fifteenth Report, 26 FCC Rcd 9664, Table 20 (2011) (indicating that the average revenue per minute for a wireless telephone call dropped from approximately 44 cents per minute in 1993 to five cents per minute in 2009) and Glen Campbell, Bank of America Merrill Lynch, 3Q Global Wireless Matrix, 2 (Sept. 28, 2011) (reporting that the average revenue per wireless minute was three cents, down from four cents at the end of 2010).)

⁷ § 227(b)(2)(C) of the TCPA

The CUNA petition argued that the FCC has recognized these changing phone trends before, such as by allowing cell phone numbers to be added to the national telemarketing Do Not Call registry, even though the statute only authorized the registry for residential lines.⁸

The petition also sensibly argued that “the lack of a charge for the call or text” should constitute an “affirmative defense.” An affirmative defense of this nature would potentially simplify litigation: “Determining whether the call was free would require little more than ascertaining the nature of the called party’s wireless plan. Competent plaintiffs’ counsel hopefully would undergo that diligence before even filing a claim knowing that it would be quickly dismissed if the called party had an unlimited plan.”

Proposed limitations on the exemptions

The CUNA petition suggests application of conditions in granting either or both of the EBR or free-to-the-called-party exemption:

- (1) “Calls and text messages must identify the name of the credit union and include contact information for the credit union; for voice calls, these disclosures would need to be made at the beginning of the call;”
- (2) “Each credit union shall send or place only one call or text message per day, up to a maximum of three calls or text messages combined per week from a specific credit union (unless the call or text is also exempted based on the free-to-end-user exemption for certain communications from financial institutions or the BBA amendment concerning the collection of federally-backed debt);” and
- (3) “Credit unions relying on this exemption must offer the party being contacted an easy to use and effective ability to opt out of receiving future autodialed or prerecorded or artificial voice calls and text messages, which the credit union will honor.”

Presuming the FCC would apply the exemptions to all non-telemarketing calls, conditions 1 and 3 would be beneficial to consumers; these are already standard marketing research practices and generally required by our industry’s primary ethics codes.⁹ For instance, relating to condition 1, MRA’s code, which applies to individual professional members of the Insights Association, states that researchers must, “Proactively or upon request identify by name the research organization collecting data.”¹⁰ CASRO’s code, which applies to company and organizational members of the Insights Association, states that, “The interviewer/research organization/sponsoring entity representative or the research invitation must provide prompt and honest identification of his/her research organization affiliation.”¹¹ Relating to condition 3, the Insights Association states that, “Establishing, communicating and maintaining voluntary internal do not contact lists is an essential aspect of respondent cooperation.”¹²

⁸ 2003 TCPA Order, 18 FCC Rcd. at 14039, ¶ 36

⁹ Until the Insights Association publishes a new code of ethics, expected in late 2017, the MRA code applies to individual members and the CASRO code applies to company members.

¹⁰ MRA Code of Marketing Research Standards. The Marketing Research Association. Article I, #5. (October 2013) http://www.insightsassociation.org/sites/default/files/misc_files/mra_code.pdf

¹¹ Code of Standards and Ethics for Market, Opinion, and Social Research. Council of American Survey Research Organizations. I(B)(2)(1). (September 2013). http://www.insightsassociation.org/sites/default/files/misc_files/casro_code_of_standards.pdf

¹² “Internal Do-Not-Contact Lists: Best Practices for Researchers.” Insights Association. (April 2016). <http://www.insightsassociation.org/issues-policies/best-practice/internal-do-not-contact-lists-best-practices-researchers>

However, while conditions 1 and 3 are reasonable, condition 2 is problematic. A cap on the number of calls or texts per day or week may work fine for a credit union relating to its members, but researchers must collect responses from a reasonable sample of a given population, sometimes in a short period of time, and at the convenience of the respondents. There is no common practice on the number of research call attempts to make to reach a household, because each household's interests and expectations are different. Therefore, the FCC should not institute a cap or limitation on the number or frequency of calls for research purposes, or perhaps only be instituted for calls made using an artificial or recorded voice (the original understanding of a "robocall").

Conclusion

The Insights Association, on behalf of the marketing research and analytics industry, urges the FCC to pursue either or both of an existing business relationship exemption or a free-to-the-called-party exemption in the TCPA rules, as requested by the CUNA petition, applicable to all non-telemarketing calls, including calls made for marketing research purposes. We look forward to working with the FCC on this issue and, more importantly, broader TCPA reform.

Sincerely,

A handwritten signature in black ink, appearing to read "Howard Fienberg". The signature is fluid and cursive, with the first name "Howard" being more legible than the last name "Fienberg".

Howard Fienberg, PLC, PPC
Director of Government Affairs
The Insights Association